IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO: AAU 0014 OF 2014
(High Court Criminal Case No: HAC 70/2009 [LTKA])

BETWEEN	:	**EPELI ULUIKAVORO DRAU**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **A. Fernando JA** **Goundar JA**
Counsel	:	**Mr M Fesaitu for the Appellant** **Mr Y Prasad for the Respondent**
Date of Hearing	:	**20 February 2018**
Date of Judgment	:	**08 March 2018**

JUDGMENT

Calanchini P

[1] I have read the draft judgment of Fernando JA and agree that the appeal against conviction should be dismissed and the sentence varied to a term of imprisonment of 10 years with a non-parole term of 8 years.

A. Fernando JA

[2] The Appellant appeals against his conviction for Manslaughter and the sentence of 12 years imprisonment imposed on him with a non-parole period of ten years by the High Court of Fiji sitting at Lautoka, on the 26th of March 2012.

[3] The Appellant was originally charged by the DPP along with the charge of Manslaughter; for the offences of Robbery with Violence, Assault Occasioning Actual Bodily Harm and Resisting Arrest, under the Penal Code, Cap 17. The learned Trial Judge at the close of the prosecution case had acquitted the Appellant of the charge of robbery for lack of evidence pertaining to the items stolen as alleged and itemized in the charge, lack of evidence pertaining to the person alleged to be assaulted as per the charge and insufficiency of evidence pertaining to resisting arrest.

[4] The learned Justice of Appeal who heard the application for an enlargement of time for leave to appeal against conviction and sentence had stated; that at the leave hearing, three complaints were made against conviction and one against sentence. Having heard the complaints the learned Justice of Appeal had granted leave to appeal only in respect of one of the three complaints made against the conviction and dismissed the rest as unarguable. He had granted leave to appeal against the sentence.

[5] The ground on which leave had been given to argue against the conviction is in relation to the Appellant's complaint that at paragraph 31 of the summing up, the learned trial judge made impermissible use of the evidence of robbery with violence to prove manslaughter, when the Appellant had been acquitted of that charge. The Appellant had also complained that the learned Trial Judge had sentenced the Appellant on the basis that the victim was killed in the course of a robbery with violence, of which he was acquitted. It had been the view of the learned Justice of Appeal who heard the leave application that the issue regarding the use of evidence relating to an acquitted charge by the learned Trial Judge in his summing up and in his sentencing remarks is an arguable ground. The Appellant had not filed any submissions in relation to the hearing of this appeal nor did he raise any new grounds.

[6] Thus there were two grounds of appeal that came to be argued at the hearing before us, one against conviction and the other against the sentence, i.e. the use of evidence relating to an acquitted charge, by the Trial Judge, namely robbery with violence; to convict the Appellant for Manslaughter and the use of the said evidence in passing sentence. The Appellant had also complained that the sentence imposed is on the higher end of the tariff for manslaughter.

[7] An examination of the disputed portions of the summing up is necessary to understand whether there is any merit in the ground of appeal against conviction. The learned Trial Judge had, as it was his duty to do, summarised the evidence of the prosecution witnesses. In doing so he had made reference to the evidence of Salesh Narayan who was an eye-witness to the incident and a son of Prem Narayan, the deceased. Salesh, in recalling the incident had said that he along with his father the deceased, his brother Vikash and a neighbour were drinking grog at about 10 pm on the day of the incident, namely the 13th of March 2009, when the Appellant came into their house. At paragraph 31 of the Summing Up the learned Trial Judge had stated as follows in referring to the evidence of Salesh: "As he went to visit the washroom, Yaca whom he identified as the accused in the dock, came into their house drunk. The accused was seen with the deceased inside the shop adjacent to the house snatching cigarette packets from the deceased a little later. The accused was seen taking some money from the cash till, the amount of which the witness was unaware of. The witness saw the accused, thereafter, pushing the deceased and hitting him twice. The witness said that the accused hit the deceased on his chest and the face. The deceased, Prem Narayan fell backwards and the witness rushed to the father as he lay on the floor..." At paragraph 32 the learned Trial Judge referring to the cross-examination of Salesh had said "He said he could not exactly remember what items the accused put into a sack from the shop". (verbatim for the summing up)

[8] It is to be noted that the Appellant had been acquitted of the charge of robbery with violence due to, as stated at paragraph 2 above, for lack of evidence pertaining to the items stolen as alleged and itemized in the charge. According to the charge the Appellant is alleged to have robbed from the deceased of "cash $ 700.00, 1 digital camera valued at $ 800.00, 4 Vodafone recharge cards valued at $ 20.00, assorted cigarettes valued at $ 119.00 and assorted groceries valued at $250.00" The learned

Trial Judge in his Order acquitting the Appellant of the robbery charge, which was the second count in the Charge Sheet had stated at the conclusion of the prosecution case "Many items referred to in count (2) were not spoken of by any of the witnesses and nothing was recovered." He had gone on to say that "Prejudice is caused to the accused on the theft of some Tuna Tins to bring home the charge of robbery with violence." (verbatim for the High Court record)

[9] It is not for us to go into the correctness of this Ruling, but the fact remains an incident had taken place prior to the assault on the deceased and which is so interconnected to the assault. It is something that happened during the course of the same transaction. It was not, in my view, necessary for the learned Trial Judge to have extricated the connected circumstances relating to the offence when he summed up to the assessors. This was relevant background information the assessors had to be aware of. The only question to be determined is the relevancy of such evidence as stated in **Makin v AG for New South Wales [1894] AC 57, 65**, and I am of the view that it was relevant. It also can be taken as the motive for the attack on the deceased, which the prosecution was entitled to place before the assessors, although not bound to prove. I am also of the view that no prejudice could have been caused to the Appellant as the assessors would have heard that evidence when the witnesses for the prosecution testified at the trial. To direct the assessors not to consider that evidence would have confused them. It would have amounted to mental gymnastics for the assessors to remove this evidence from their minds, even if the Trial Judge had directed them to do so.

[10] It happens in many cases that some of the charges laid against an accused in an indictment are not proved and therefore he is acquitted of them at the close of the prosecution case; while the case proceeds against the other charges. In such situations there is no need for the Trial Judge to ask the assessors to disregard the evidence led pertaining to those charges of which the accused has been acquitted. There are also cases that the assessors would return an opinion of not guilty against some of the charges and guilty against the others based on the evidence led. This is totally different to where reference in a summing up is made to the evidence in a different case of which the accused had been acquitted or of another incident for which the accused had not been charged. Such references are generally not permissible. Counsel

for the Appellant admitted that there is nothing to indicate on the record that the Appellant's Counsel at the trial had requested for a direction from the Trial Judge to exclude the evidence pertaining to the robbery from the summing up.

[11] I therefore have no hesitation in dismissing the ground of appeal raised against the conviction.

[12] The sentence imposed had been challenged on the basis that evidence relating to an acquitted charge, namely robbery with violence had been used in passing sentence and that the sentence imposed is on the higher end of the tariff for manslaughter. It is correct that the learned Trial Judge had referred to evidence relating to robbery with violence in his Sentencing Order.

[13] The learned Trial Judge having referred to the aggravating factors, had arrived at the sentence imposed in the following manner: "In the circumstances, I would pick-up the starting point at ten year-imprisonment and add four years to reflect the aggravating circumstances in offending and arrive at fourteen years in the interim. I would reduce the sentence by two years to denote that the accused's behaviour for the last nine years had been free from any reported criminal activity. There was no meaningful remorse or any other extenuating circumstances to consider further reduction. I will, accordingly, impose a term of twelve years as the punishment for the offence of manslaughter. The accused shall serve a term of ten years with effect from 23 March 2012 before he becomes eligible for parole.".

[14] The learned Trial Judge had said at paragraph 2 of his Sentencing Order, prior to making reference to the attack on the deceased: "The accused then got into acts of snatching cigarettes and asking for money from the deceased-Prem Narayan..." and again at paragraph 6: "The accused then engaged in the conduct of robbing the deceased- Prem Narayan..."

[15] In regard to the ground of appeal against the sentence, at paragraph 15 of the Written Submissions of the State; learned Counsel for the Respondent had stated: "State submits that the sentence imposed by the trial Judge was at the higher end of tariff after taking into consideration aggravating factors from the acquitted charge of

robbery with violence. State concedes that the trial Judge fell in error when considering the acquitted charge of robbery with violence during sentencing." (verbatim) I am of the view that the learned Trial Judge erred in taking into consideration robbery as an aggravating factor. Even if the Appellant had been convicted of robbery, it would have been incorrect to take that into account as an aggravating factor in passing sentence for manslaughter, for that would amount to double counting.

[16] It has been stated at **paragraph 5-89 of Archbold 2017**: "*Where a defendant has been tried for a number of offences, and has been acquitted of some and convicted of others, or has been convicted of a lesser offence than that charged in the indictment, the sentencer must accept the implications of the verdict in determining the factual basis of the sentence: see R. v. Ajit Singh, 3 Cr. App. R.(S.) 180, CA (wrong to sentence defendant acquitted of wounding with intent on the basis that the wounding was "deliberate"); R. v. Hazelwood, 6 Cr. App. R. (S.) 52, CA (wrong to sentence offender convicted of common assault on the basis that the assault was with intent to resist arrest); R. v. Keles, 10 Cr. App. R.(S.) 78,CA; and R. v. Baldwin, 11 Cr. App. R.(S.) 139, CA.*" At paragraph 5-89 of Archbold 2017 it is stated: "*Where the prosecution does not proceed on counts to which the defendant has pleaded not guilty, the sentencer must sentence on the basis that he is not guilty of those offences: see R. v. Booker, 4 Cr. App.R.(S.) 53, CA; R. v. Johnson (W.C.), 6 Cr. App. R. (S.) 277, CA; and R. v. Stubbs, 10 Cr. App. R. (S)97, CA.*"

[17] However the learned Trial Judge in my view could have taken into consideration the violent events leading up to the commission of the offence of manslaughter and that this had been an unprovoked attack on a 50 year old man.

[18] Counsel for the Respondent having said that that the trial Judge fell into error when considering the acquitted charge of robbery with violence during sentencing, had then gone to rely on the case of **Kim Nam Bae v The State Criminal Appeal No. AAU 0015 of 1998** to justify the sentence on the basis of the 'high degree of physical violence' used by the Appellant. This Court had held in **Kim Nam Bae**: "*The cases demonstrate that the penalty imposed ranges from a suspended sentence where there*

may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal".

[19] The Respondent's submissions appear to flow from the Trial Judge's comments in his Sentencing Order that the deceased was dealt with 'severe blows' or 'severe punches'.

[20] The evidence of Salesh Narayan, the son of the deceased and the only eye-witness to the incident, is the only one to speak about the degree of violence used by the Appellant in this case. According to him "Then I saw accused punching my father…He hit my father twice. He hit him on the chest. Second a face at mouth. He fell backwards on the floor". (verbatim from the record). In cross-examination in answer to the question as to how heavy were the blows; the witness had said "It was a strong punch". Salesh thus speak of only one blow in the region of the face. A 'strong punch' to amount to an aggravating factor should have left behind some serious external injury.

[21] The Post-Mortem Report tendered in evidence in this case has described the external injuries found on the deceased as a small laceration of 0.5 cm on the outer and in the inner surface of the right lower lip, a bruise on the chin and right maxillary area and an abrasion over right eyebrow and right forehead. No questions have been asked from the doctor as to how these external injuries could possibly have been caused. The medical evidence does not show that the deceased had been dealt with 'severe blows' or 'powerful punches'. According to the medical evidence the cause of death had been due to subdural and subarachnoid haemorrhages as a result of the deceased falling backwards due to impact on a hard surface. The doctor had not said that the internal injuries correspond to any one of the external injuries or were from the punches or blows. The medical evidence do not indicate that the degree of violence used was that of a 'high degree' as argued by the Respondent, but it is the fall, resulting from the blows, that caused 'severe head injuries' which resulted in the death of the deceased. It appears that the learned Trial Judge had confused 'severe head injuries' with 'severe blows'.

[22] I am therefore of the view that the learned Trial Judge also erred by taking into consideration the severity of the blows as an aggravating factor as it was not supported by medical evidence.

[23] The learned Trial Judge had in passing sentence, erred in saying: "I would reduce the sentence by two years to denote that the accused's behaviour for the last nine years had been free from any reported criminal activity." According to the previous convictions of the accused as per the Criminal Records Office, this was an incorrect statement as the last conviction had been on 28th May 2003 and that was 5.7 years prior to the commission of this offence. The last conviction was also for robbery with violence.

[24] I am of the view that the learned Trial Judge was right to have taken into consideration as aggravating factors the fact that "the Appellant was intoxicated at the time of the incident, that he gained entry into the house of the deceased using his acquaintanceship as a friendly neighbour and thus breached the trust reposed on him and that his behaviour destroyed the serenity that the family of the deceased was to enjoy inside their dwelling house causing no harm to others".

[25] The learned Trial Judge had said after making reference to the Appellant's past behaviour that "there was no meaningful remorse or any other extenuating circumstances to consider further reduction". We were informed at the hearing of this appeal that the Appellant had been in remand for a period of 4 months prior to his conviction.

[26] In view of the matters set out above I am of the view that the learned Trial Judge had erred in some respects in passing sentence and I therefore quash the sentence imposed on the Appellant and pass in substitution thereof a sentence of 10 years imprisonment with effect from the 23rd of March 2012. In doing so I have taken into consideration as required by section 24 of the Sentencing and Penalties Act 2009, the period of 4 months the Appellant had spent in remand, prior to his conviction. The Appellant will not be eligible to be released on parole for a period of 8 years from the 23rd of March 2012.

Goundar JA

[27] I agree with the reasons and conclusion of Fernando JA.

Orders of Court:

1) *Appeal against conviction is dismissed.*
2) *Appeal against sentence is allowed and the sentence imposed by the Court below is quashed.*
3) *The Appellant is sentenced to a term of imprisonment of 10 years with a non-parole term of 8 years with effect from 23 March 2012.*

Hon. Mr. Justice Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr. Justice A Fernando
JUSTICE OF APPEAL

Hon. Mr. Justice Goundar
JUSTICE OF APPEAL